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In the Supreme Court of the United States

OCTOBER TERM, 1979

3,218.9 ACRES IN WARREN COUNTY, PENNSYLVANIA (ROSS HEIRS, DAVID OIL COMPANY, AND L.M. LILLY ESTATE), PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held (a) that the declaration of taking in this condemnation case clearly excepts certain subsurface mineral interests owned by petitioners and (b) that the district court improperly enlarged the taking to encompass those interests.

2. Whether the government's alleged failure to clarify the declaration proved a bad faith intent to take interests without paying just compensation.

3. Whether petitioners are at present entitled to damages for a taking on the basis of possible future interferences by the government with removal of petitioners' subsurface minerals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 619 F. 2d 288. The opinion of the district court denying the government's motion for a new trial (Pet. App. 11a-21a) and the district court's pretrial order (Pet. App. 22a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31a-33a) was entered on May 15, 1980. The petition for certiorari was filed on July 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed a declaration of taking and complaint to acquire land for the Allegheny National Forest, bordering on the Allegheny Reservoir, in Pennsylvania. Not all of the surface estates and subsurface estates were held in the same ownerships. Some of the subsurface mineral interests in one of the tracts to be taken (notably interests in non-producing oil and gas) were owned by individuals with no surface estates, and other subsurface mineral interests were held by surface estate owners (Pet. App. 2a-3a).

Because the federal interest in acquiring land for a national forest is to use and maintain the land for timber, to protect streams, and to develop and maintain adequate outdoor recreation resources, the government had no need for the subsurface mineral resources. Accordingly, the declaration of taking excepted such subsurface interests in the following terms (Pet. App. 36a):

> *Tract 961*: The estate to be taken is the fee simple title, subject, however, to * * * the reservation in the owners thereof, their successors or assigns of all coal, oil, gas, and other minerals not outstanding

> of record in third parties, together with the right to enter upon the land and prospect for, mine, and remove the same in accordance with the rules and regulations of the Secretary of Agriculture dated April 30, 1963, * * * and the exception of all coal, oil, gas, and minerals outstanding of record in third parties.

By the terms of that exemption, the United States excluded from the taking the subsurface interests of those who held no interest in the land at all other than a record title to the subsurface minerals; and it also excluded the subsurface mineral interests of those who owned any additional interest in the fee, but subjected those subsurface interests to the condition that any entry the owners made upon the surface in order to mine must conform to the rules and regulations of the Secretary of Agriculture, which were attached to the Declaration of Taking (Pet. App. 34a-43a).

The known owners of any interests in the surface estate were duly served with notices of condemnation, including those owning both mineral and surface interests. The record owners holding only subsurface mineral interests were not served. Nevertheless, they entered appearances and claimed that they were entitled to compensation. They argued that the uses to which the surface estate would be put, and the restrictions placed by the Secretary on the manner in which minerals could be extracted so substantially reduced the value of their property interests as to amount to a taking (Pet. App. 4a).

The government filed a motion to dismiss these claimants on the ground that the declaration of taking had specifically and totally excepted their interests from the condemnation (Pet. App. 5a). Holding that the government's motion to dismiss the oil and gas claimants

was proof of the ambiguity of the declaration of taking and complaint, the district court denied the motion (Pet. App. 13a-14a). The court then conducted a hearing at which it permitted petitioners—owners of subsurface interests—to submit damage claims to the jury. By special verdict, the jury awarded them a total of $485,812 for the taking of their subsurface interests. In both the pretrial order and its ruling on the government's motion for a new trial, the district court held, contrary to the government's assertions, that the declaration of taking and complaint took an interest in those oil and gas claims (Pet. App. 12a-20a, 27a-29a).

Holding that the district court had erroneously enlarged the nature of the estate taken, contrary to the explicit language of the declaration of taking, the court of appeals reversed and remanded with instructions to vacate the $485,812 award in favor of petitioners as the owners of the subsurface estates (Pet. App. 7a). Regarding the possibility that in the future the Secretary's rules might inhibit the removal of minerals and greatly diminish the value of drilling rights, the court of appeals held that "a possible future taking of property does not give rise to a present cause of action for damages" (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is accordingly unwarranted.

1. It is axiomatic in federal eminent domain proceedings that a district court lacks power to enlarge its jurisdiction to compensate by expanding a declaration of taking to encompass lands or interests explicitly excluded or not taken. See, *e.g.*, *Berman* v. *Parker*, 348 U.S. 26, 35-36 (1954); *United States* v. *21.54 Acres of Land, Marshall*

County, W. Va., 491 F. 2d 301, 304-305 (4th Cir. 1973); *United States* v. *3,317.39 Acres in Jefferson County, Ark. (Ark Mo Farms)*, 443 F. 2d 104, 105-106, (8th Cir. 1971), cert. denied, 404 U.S. 1025 (1972); *United States* v. *64.88 Acres in Allegheny County, Pa. (Chubb)*, 244 F. 2d 534, 536 (3d Cir. 1957). The court of appeals correctly held (Pet. App. 7a) that the language of the taking respecting subsurface mineral interests is clear, particularly since no plausible alternative reading to the one proffered by the government had been suggested. Accordingly, the district court was not free to enlarge the taking by declaring the language "ambiguous."

2. The court of appeals properly rejected (Pet. App. 9a) petitioners' attempt to secure judicial review, under the so-called "bad faith" exception, of the Secretary of Agriculture's decision to take the property described in the declaration of taking. The fact that, as petitioners contend (Pet. 25-27), the government has not always exempted subsurface mineral interests in past condemnation proceedings and that it declined to "clarify," to petitioners' satisfaction, the language at issue here, in no way establishes a bad faith intent on the part of the government to refuse to abide by what the court of appeals properly characterized as an "explicit limitation of the nature of the estate to be taken" (Pet. App. 7a).

3. The legal right of the third party subsurface owners in this case to exploit their interests was unimpaired by the condemnation. See *United States* v. *677.50 Acres in Marion County, Kansas (Clear Creek, Inc.)*, 420 F. 2d 1136, 1138-1140 (10th Cir.), cert. denied, 398 U.S. 928 (1970). If, in the future, the Secretary's rules should so inhibit mining as to amount to a taking of the mineral estate, the subsurface owners could then bring a separate action for just compensation in the Court of Claims under

the Tucker Act (or in the district court if they seek less than $10,000). 28 U.S.C. 1346(a)(2); 28 U.S.C. 1491; *United States* v. *3,317.39 Acres in Jefferson County, Ark. (Ark Mo Farms), supra*, 443 F. 2d at 106. As the court of appeals correctly held, however, "a possible future taking of property does not give rise to a present cause of action for damages" (Pet. App. 7a). See *Hurley* v. *Kincaid*, 285 U.S. 95, 104 (1932).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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